No. 80-1004

In the Supreme Court of the United States

OCTOBER TERM, 1980

J. LEE HAVENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge erred in ordering the cross-examination of petitioner to proceed without interruption for consultation with his attorney, after the cross-examination had been interrupted by defense counsel's request for a bench conference.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1980. A petition for rehearing was denied on October 24, 1980 (Pet. App. 13-14). The petition for a writ of certiorari was filed on December 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing cocaine with intent to distribute it and of importing and conspiring to import cocaine, in violation of 21 U.S.C. 841(a)(1), 952(a), 960(a)(1) and 963. He was fined $5,000 and sentenced to three concurrent eight-year terms of imprisonment, to be followed by a special parole term of three years. The court of appeals reversed the convictions on Fourth Amendment grounds. 592 F. 2d 848 (1979). This Court granted certiorari, reversed the judgment of the court of appeals, and remanded for further proceedings. 446 U.S. 620 (1980). On remand, the court of appeals affirmed the convictions (Pet. App. 13).

The evidence adduced at trial is detailed in this Court's opinion. See 446 U.S. at 621-624. Petitioner and John McLeroth, an attorney from Fort Wayne, Indiana, arrived in Miami on a flight from Lima, Peru. A customs search of McLeroth revealed cocaine sewed into makeshift pockets in a T-shirt he was wearing. After McLeroth implicated petitioner, customs officers arrested petitioner and searched his luggage. Inside they found a T-shirt with pieces cut out of it that corresponded to the pockets sewed into McLeroth's T-shirt. Prior to trial, petitioner's motion to suppress the

T-shirt was granted on the ground that the search of the luggage violated the Fourth Amendment.

McLeroth testified at petitioner's trial that he and petitioner had made several trips to Peru, that petitioner had supplied him with the altered T-shirt, and that petitioner had sewed the pockets closed to prevent the cocaine bags from falling out. Petitioner testified in his own defense and denied any involvement in cocaine smuggling. He further denied involvement in the "kind of activity" described by McLeroth, which included the taping or draping of material around McLeroth's body.

On cross-examination, petitioner was shown the altered T-shirt. He denied ever having seen it other than in a photograph taken of McLeroth at the airport and denied having anything to do with the sewing of swatches onto the shirt. The prosecutor then asked petitioner if he had any medium T-shirts in his suitcase when he came through customs (Tr. 384).[1] Before petitioner replied, defense counsel requested a bench conference. The jury was excused, and petitioner was asked to step outside the courtroom for a minute (Tr. 385). During the conference the prosecutor informed the court that he intended to introduce for impeachment purposes the cut T-shirt that had been suppressed from the government's case-in-chief if petitioner denied having brought the T-shirt through customs (Tr. 391). After some discussion, the court ruled that if petitioner denied having the shirt in his suitcase, the prosecution could impeach this testimony by introducing evidence that the cut shirt was found in petitioner's luggage. The following colloquy occurred between the court and defense counsel (Tr. 398-403):

> MR. McCAIN: How can he be impeached, Your Honor, if it was not covered on direct, whether or not he had—

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[1] "Tr." refers to the transcript of the proceedings at trial.

THE COURT: It does not have to be covered on direct. If he denies something under oath, which is—

MR. McCAIN: Well, he wouldn't—if he were asked the question, Judge, "[w]as there a tee shirt found, Size 38-40 in your suitcase?" He is not going to lie under oath. He is going to say:

"Yes, there was."

THE COURT: Fine. Then, that takes care of it.

MR. McCAIN: He is not going to lie under oath. I can guarantee that. Not with me representing him, he won't.

THE COURT: Well, we will soon find out, because I guess he will be asked.

MR. McCAIN: I will guarantee that he will say, he will, if he is asked that question, and he is under oath, and he is required to answer that question because of a ruling by the Court, then he will answer:

"Yes, there was a Size 38-40 tee shirt found in the luggage," in his luggage.

* * * * *

MR. McCAIN: Then, as I understand it, from your ruling, then at that point they can put the tee shirt in evidence against us.

THE COURT: Not if he answers truthfully.

* * * * *

MR. McCAIN: May I now have an opportunity to advise my client?

THE COURT: No, sir. You may not. You may not at all. The whole purpose of this is not for you to go out and coach your client as to what to say.

MR. McCAIN: I am not going to tell him what to say.

THE COURT: Well, that's what you just asked me permission to do. That's why I asked him to step out, so he would not hear this discussion.

* * * * *

MR. McCAIN: May I get my client?

THE COURT: Would you wait just a minute? The Marshal will get him in just a second.

* * * * *

There will be no conversation with the witness.

Petitioner then denied having a T-shirt in his luggage on the day it was searched and denied having told a DEA agent that the T-shirts found in his suitcase belonged to McLeroth (Tr. 405). On rebuttal the government called the agent, who testified that, in petitioner's presence, he had discovered the cut-up shirt in petitioner's suitcase and that petitioner had told him that it belonged to McLeroth (Tr. 440-441).

ARGUMENT

Petitioner contends (Pet. 10-12) that this Court's decision in *Geders* v. *United States*, 425 U.S. 80 (1976), requires the reversal of his conviction. In *Geders*, this Court held that an order preventing a defendant from consulting his counsel "about anything" during an overnight recess between his direct and cross-examination impinged upon the defendant's Sixth Amendment right to the assistance of counsel. The Court concluded that "concern for the integrity of the trial" could not justify "a sustained barrier to communication between a defendant and his lawyer." 425 U.S. at 91. The Court specifically noted, however, that a trial judge concerned about improper coaching of the defendant may invoke other remedies, such as requiring that the trial continue beyond normal court hours so that the direct and

cross-examination of the defendant can be completed without interruption. 425 U.S. at 90.

The Fifth Circuit, as well as other courts of appeals, have extended the holding of *Geders* to shorter, midday recesses. See *United States* v. *Conway*, 632 F. 2d 641 (5th Cir. 1980) (lunch recess); *United States* v. *Bryant*, 545 F. 2d 1035 (6th Cir. 1976) (one hour lunch break); *United States* v. *Allen*, 542 F. 2d 630 (4th Cir. 1976), cert. denied, 430 U.S. 908 (1977) (routine recesses of 20 minutes and "a minute"); see also *United States* v. *Vesaas*, 586 F. 2d 101, 102 n.2 (8th Cir. 1978) (dictum). However, these decisions have no application here. The court was not in recess. Defense counsel, not the court, had interrupted the cross-examination by requesting a bench conference. Where, as here, the court is concerned that counsel will coach the defendant, *Geders* makes clear that the trial court has power to direct that "the examination of the witness continue without interruption until completed." 425 U.S. at 90.[2] The fact that defense counsel interrupted the cross-examination by a request for a bench conference did not deprive the court of the power to go forward immediately as if the interruption had not occurred, once it determined that the objection raised during the conference should be rejected. Otherwise, the trial

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[2]Petitioner suggests (Pet. 12) that the truth seeking process was not aided here by the court's ruling because the court's fear was that petitioner might be advised by counsel to tell the truth, rather than lie. This suggestion is without merit. The exposure through impeachment evidence of a witness's willingness to lie under oath is an important part of the truth seeking process. Here, the trial judge had ample reason to believe that petitioner, himself an attorney, had tailored his testimony in reliance on the assumption that the evidence of the T-shirt could not be used to impeach him. Therefore, an exercise of the trial court's power to continue the examination without interruption so as to prevent improper influence on the defendant's testimony was as appropriate here, where the danger existed that the defendant would be coached to give one truthful answer in order to preserve the credibility of the rest of his testimony, as in the case where the court is concerned that the defendant will be coached to lie.

court's power to direct that examination proceed without interruption would be illusory because it could be defeated at any time by a request for a bench conference by defense counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981

DOJ-1981-02